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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

ESTATE OF SANDRA WESTALL

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal involves a dispute in a nonintervention probate over the disposition of a parcel of real property located in Gig Harbor, Washington (the “Commercial Real Property”). Appellant Claude E. “Paul” Westall, the surviving spouse of decedent Sandra Westall, petitioned and was appointed to serve as Personal Representative of the community property of the Estate of Sandra Westall. Respondent Bill Peacher, Sandra’s brother, was nominated in Sandra’s Will to serve as Personal Representative of her estate and appointed by the court as the Personal Representative as to the separate property of her estate.

Bill Peacher was also nominated by Sandra Westall to serve as Trustee of the Special Needs Trust (the “Trust”) established in her Will for Destiny Westall, the only child of Paul and Sandra Westall. Destiny Westall is developmentally disabled, and Sandra created the testamentary Trust to provide for Destiny’s lifetime care. Sandra Westall funded the Trust in part by leaving her one-half share of the community property, both real and personal, to the Trust. Thus, when Sandra died, and her Will was admitted to probate, title to an undivided one-half interest in the Commercial Real Property vested in Bill Peacher as Trustee of the Special Needs Trust for Destiny Westall.

Since that time, Paul Westall – who has expressly stated that his goal in this case is to retain the Commercial Real Property – has repeatedly endeavored to acquire the Trust’s one-half interest in that Commercial Real Property. He has made several offers to Trustee Bill Peacher to purchase the Commercial Real Property from the Trust, but Bill Peacher has rejected those offers, stating that the Property should be put on the market because he believes it is worth more than the amounts that have been offered by Paul Westall, notwithstanding the several valuations that have been provided by various parties.

Ultimately, Paul Westall took the matter directly to the court, filing a motion asking the court to approve a sale to himself of the Trust’s undivided one-half interest in the Commercial Real Property. In his motion, Mr. Westall referred to that one-half interest as the “Community Estate’s” interest in the Commercial Real Property and argued that, as the Community Property Personal Representative, he “has the legal right, without Court intervention, to sell the Estate’s community interest in The Gig Harbor Property to himself.” Mr. Westall has stated that, although he has that right, he brought the motion seeking approval of his proposed purchase of the Trust’s interest in the Commercial Real Property “in an abundance of caution.”

The trial court properly declined to grant Paul Westall’s motion. Instead, at the urging of counsel for Bill Peacher and attorney Robin Balsam,

the Litigation Guardian ad Litem appointed by the court to represent Destiny Westall, the court ordered that an independent attorney be appointed to test the market by listing the Commercial Real Property for sale and to bring any offers he received for the Commercial Real Property to the attention of the parties. Mr. Westall took issue with those rulings and filed a Notice of Appeal initiating this appeal.

II. ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly deny Paul Westall's motion seeking to compel the sale to himself of the Trust's undivided one-half interest in the Commercial Real Property?

2. Did the trial court have the authority to appoint an independent third party to see that the Commercial Real Property was listed for sale and that any offers received be directed to the parties for evaluation?

3. Does the trial court have the authority to partition the Commercial Real Property over the objection of Paul Westall?

III. STATEMENT OF THE CASE

Sandra and Paul Westall were married in 1986. *Supplemental Clerk's Papers ("SCP")*: Sealed Guardian ad Litem Report filed 11/23/15, p. 14, l. 18. Sandra and Paul Westall have one child together, their daughter,

Destiny Westall, who was born in 1988. CP 9. Destiny is developmentally disabled. *SCP*: Sealed Guardian ad Litem Report filed 11/23/15, p. 4-5.

For years, Paul and Sandra resided at 8508 - 86th Avenue NW in Rosedale. CP 243, 251, 256. Together, through a jointly-owned company, the Westall Corporation, they operated a salon and sold Merle Norman cosmetics at the Commercial Real Property, a house that was zoned for business purposes and located at 9017 Peacock Hill Avenue in downtown Gig Harbor. Clerk's Papers ("CP") at 243, 244; *SCP*: Sealed Guardian ad Litem Report filed 11/23/15, p. 11, 14. The salon occupies about 1500 square feet on the main floor of the building, and there is a 680-square foot apartment on the upper level. CP 430; *SCP*: Sealed Guardian ad Litem Report filed 11/23/15, p. 14.

On its federal income tax returns, the Westall Corporation reported paying the Westalls \$38,679.00 and \$34,507.00 in tax years 2013 and 2014, respectively, for its occupation and use of the Commercial Real Property. *SCP*: Declaration of Jennifer Dow re: Corporate Tax Returns filed February 8, 2017, p. 2, 4, 18. The Westall Corporation reported on its 2015 federal income tax return that it paid no rent for its tax year beginning July 1, 2015, and ending June 30, 2016, the year after Sandra Westall died. *SCP*: Declaration of Jennifer Dow re: Corporate Tax Returns filed February 8, 2017, p. 34. There is no record that the Corporation has paid any rent to the

estate for its occupation and use of the Commercial Real Property since this probate action was opened. *SCP*: Reply to Westall's Strict Reply, filed March 2, 2017, p. 3.

As for the apartment on the upper floor of the Commercial Real Property, Paul Westall states in his Opening Brief that "[f]or all relevant time periods, Paul has lived at the Commercial Real Property and it is his only home." Appellant's Opening Brief, p. 4, ll. 2-4. As of April 2015, however, the month after Sandra Westall's death, that apartment was subject to an "arm's length lease for \$950 monthly." CP 429. That tenancy ended shortly thereafter, however, because Paul Westall informed the LGAL that the apartment was unoccupied as of August, 2015. *SCP*: Sealed Guardian ad Litem Report filed 11/23/15, p. 14, ll. 23-24. Based on that report, Paul Westall apparently moved into the apartment at some point thereafter and continues to reside there. Appellant's Opening Brief, p. 4.

Sandra and Paul separated in early 2013. *SCP*: Sealed Guardian ad Litem Report filed 11/23/15, p. 11, l. 20. The house where they had lived in Rosedale before they separated was sold in June 2015, after Sandra's death, when the party that was leasing the house exercised its option to purchase the Rosedale residence pursuant to a lease/purchase option agreement that had been signed back in 2012. CP 243, 256; *SCP*: Sealed Guardian ad Litem Report filed 11/23/15, p. 11, ll. 4-10. Following that sale, Paul

Westall's half of the proceeds (resulting from his own undivided one-half community property ownership of that property) were paid directly to Paul and other the half of the proceeds (Sandra Westall's undivided one-half community property share) were held in the Estate account. CP 500.

When Sandra and Paul separated in 2013, Paul moved into a fifth wheel camper on the property of some friends in Gig Harbor, and Sandra moved in with her mother in Puyallup. SCP: Sealed Guardian ad Litem Report filed 11/23/15, p. 11, ll. 20-23.

In the spring of 2014, Sandra was diagnosed with cancer. *SCP* Sealed Guardian ad Litem Report filed 11/23/15, p. 12, l. 21. Shortly thereafter, Sandra Westall prepared a Will in which she established a Special Needs Trust for Destiny. CP 8-19. In her Will, Sandra chose to fund that Trust by leaving her one-half (50%) share of her community property, including her interest in the Commercial Real Property, to her brother, Bill Peacher, whom she named to serve as Trustee of that Trust. CP 10-16. In March 2015, Sandra Westall passed away. CP 1.

In May 2015, after Sandra's death, Paul Westall and Bill Peacher filed a joint Petition seeking to admit Sandra's Last Will and Testament to probate. CP 1-5. Paul Westall and Bill Peacher were appointed Co-Personal Representatives of Sandra's Probate Estate, with Paul administering the community property of the Estate and Bill administering the separate property

of the Estate, which was negligible. CP 21. Bill Peacher was also appointed Trustee of the Special Needs Trust for Destiny Westall, which was established in Sandra Westall's Will. CP 13.

In June 2105, the parties agreed that Destiny Westall may not understand the effects of the legal proceedings involved with the probate, and stipulated that attorney Robin Balsam should be appointed as Litigation Guardian ad Litem for Destiny Westall. *SCP*: Agreed Findings of Fact, Conclusions of Law, and Order Appointing LGAL (the "Agreed Order"), filed July 15, 2015. That Agreed Order directed the LGAL to investigate and make a confidential report to the Court regarding Destiny Westall's capabilities and her ability to participate in the probate proceedings, and to make a determination as to whether a guardianship should be initiated for Destiny. *SCP*: Agreed Order, p. 3-4. The Agreed Order also granted broad authority to the LGAL to represent the interests of Destiny Westall in the probate action, to have access to court files and health care records, and to speak with family members and friends of the family as part of her investigation. *SCP*: Agreed Order, p. 3-5. In response to this assignment, the LGAL has filed two confidential Reports and otherwise advocated on behalf of Destiny Westall in this matter. *SCP*: Sealed Guardian ad Litem and Confidential Reports filed November 23, 2015; Sealed Guardian ad Litem Report filed February 8, 2017.

Paul Westall has stated that his goal is to keep the Commercial Real Property in Gig Harbor where the salon is located and he now lives. *SCP*: Sealed Guardian ad Litem Report filed 11/23/15, p. 14, ll. 8-9. To that end, Mr. Westall has made several offers to purchase the Trust's interest in that Property. CP 363-366, 373-377. Mr. Peacher has rejected those offers and, together with the LGAL, has repeatedly taken the position that the Commercial Real Property should be listed for sale at a price that adequately reflects its true value. *SCP*: Reply to Westall's Strict Reply, p. 4., Verbatim Transcript of Proceedings ("VTP") from July 28, 2017, p. 20-24.

There have been several valuations of the Commercial Real Property during the course of this probate. The first, a Comparative Market Analysis ("CMA"), was prepared for Paul Westall in February 2016, valuing the Commercial Real Property at \$385,000. CP 271. This CMA was questioned by the LGAL and Mr. Peacher because it valued the Property at slightly over half of the its 2015 assessed value, which was \$604,900. CP 271. In response, the LGAL obtained a separate CMA in October 2016, which valued the Commercial Real Property at \$680,000 to \$720,000. CP 80-117.

Later, by sheer coincidence, counsel for Mr. Peacher discovered that Paul Westall had listed the Commercial Real Property for sale in 2014 for \$1.995 million. CP 271-276, 432. Because of the substantial differences in these valuations, Mr. Peacher obtained a commercial appraisal of the

Commercial Real Property, which determined that the Property’s “Highest and Best Use” would be to have the house torn down and the property sold at “As-is Land Value” of \$700,000. CP 392-446. When that value was disclosed to Ray Velkers, the broker who had listed the Commercial Real Property for Paul Westall in 2014, Mr. Velkers responded that he believed that “there are very good prospects of a sale at somewhere around \$1.3 million.” CP 491, ll. 5-6. Because of these many and varied opinions of value, both the LGAL and Mr. Peacher asked the Court to order that the Commercial Real Property be listed to see what the market will bear. CP 246; VTP from July 28, 2017, p. 29-30; *SCP*: Reply to Westall’s Strict Reply, p. 3-4.

In his Opening Brief, Mr. Westall recounts the various proceedings and motions he has brought in this case (ostensibly, a nonintervention probate), culminating in Mr. Westall’s motion asking the trial court to approve his purchase of the Trust’s undivided one-half interest in the Commercial Real Property – which Mr. Westall characterizes as “the Community Estate’s real property” – for half of the fair market value (\$700,000) established by appraiser Barbara Montro. CP 378-392. In response to that motion, both the LGAL and counsel for Trustee Bill Peacher filed briefs arguing that the court should deny Mr. Westall’s motion and instead enter an Order directing that the Commercial Real Property be listed for sale to test the market. CP 481-484; 485-489.

At the hearing on Mr. Westall's motion, the court ultimately agreed with the LGAL and Mr. Peacher, and entered an Order denying Mr. Westall's motion and appointing an experienced attorney, Michael B. Smith, "to list the Property for sale, engage a commercial real estate broker to handle the listing, and to bring any offers to the attention of the parties hereto." CP 539. The Order at issue contains no requirement that the Property be sold. *Id.* The Order does, however, direct that "[a]ny offer received by Michael Smith must be presented to all the parties and may not be accepted without Court approval." CP 540. In response to this Order, Mr. Westall filed his Notice of Appeal. CP 541-545.

IV. SUMMARY OF THE ARGUMENT

The trial court's denial of Paul Westall's motion seeking approval of his proposed purchase of the Trust's undivided one-half interest in the Commercial Real Property was proper because he had no basis in law to compel such a sale. Nor was there a need to sell the Property to pay debts, creditors' claims, costs of administration, or any other charges for which such real estate is liable under existing laws. Despite an obvious conflict of interest, Mr. Westall sought to acquire the Commercial Real Property for his own benefit. Mr. Westall had no basis for a sale and therefore could not compel a sale of the Commercial Real Property absent the consent of the Trustee. Because that was not given, the court properly denied Mr. Westall's motion.

When the trial court regained jurisdiction over the probate after Mr. Westall filed his motion, it exercised the broad authority granted to it by TEDRA and Title 11 to craft a remedy that would allow the probate to progress; it authorized a third party to list the Commercial Real Property for sale in order to test the market and establish a fair market value. The court did not direct that the Commercial Real Property be sold to the highest bidder because there was a possibility that the Trustee would sell the Trust's interest in the Property to Mr. Westall once the market value of the Commercial Real Property was established. So, the court took an incremental step toward resolution of the case that would not prejudice Mr. Westall's ability to purchase the Trust's interest in the Property once a fair market value was established. The remedy imposed by the trial court was reasonable and necessary to assist in the resolution of the probate and should be affirmed.

Although it did not elect to do so, the trial court could have ordered a partition of the Commercial Real Property under the authority of RCW 11.76.050, given that Mr. Westall and the Trust each owned equal interests in the Property. Because this remedy remains available, Mr. Westall's appeal is not well taken, and the Court of Appeals should make an award to the Trust of reasonable attorneys' fees and LGAL fees that the Trust has incurred in responding to this appeal.

V. ARGUMENT

A. Standard of Review.

Appellate courts review probate proceedings de novo, as they represent an exercise of a trial court's equitable powers. *In re Estate of Collister*, 195 Wn. App. 371, 374, 382 P.3d 37, 39 (2016).

B. **The Trial Court Properly Denied Paul Westall's Motion Seeking Approval of a Sale to Himself of the Trust's Interest in the Commercial Real Property Because (1) a Sale was Not Authorized by Statute or Required to Pay Any Obligation of the Estate; (2) Mr. Westall had a Conflict of Interest; and (3) the Offer was Rejected by the Trustee. .**

The trial court properly denied Paul Westall's motion because he had a conflict of interest and the sale of the Trust's one-half undivided interest in the Commercial Real Property would not be used to pay any of the decedent's debts, a family allowance, the expenses of administration, or any other charges for which such real estate is liable under existing laws. Because none of those statutorily permissible purposes would be achieved by the sale that Mr. Westall requested, the trial court was correct when it refused to approve the sale of the Trust's interest in the Commercial Real Property to Paul Westall.

1. As Personal Representative of the Community Property, Paul Westall has a Limited Right to Sell Estate Assets, But He Had No Statutory Basis to Seek a Sale to Himself of the Trust's Interest in the Commercial Real Property.

A personal representative is authorized to administer and settle a probate estate pursuant to RCW 11.48.010, which states:

It shall be the duty of every personal representative to settle the estate, including the administration of any nonprobate assets within control of the personal representative under RCW 11.18.200, in his or her hands *as rapidly and as quickly as possible, without sacrifice to the probate or nonprobate estate*. The personal representative shall collect all debts due the deceased and pay all debts as hereinafter provided. The personal representative shall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character.

(Emphasis added.)

RCW 11.68.090(1) sets forth the powers of a personal representative with nonintervention powers as follows:

Any personal representative acting under nonintervention powers may borrow money on the general credit of the estate and may mortgage, encumber, lease, sell, exchange, convey, *and otherwise have the same powers, and be subject to the same limitations of liability, that a trustee has under chapters 11.98, 11.100, and 11.102 RCW with regard to the assets of the estate, both real and personal*, all without an order of court and without notice, approval, or confirmation, and in all other respects administer and settle the estate of the decedent without intervention of court.

(Emphasis added.)

RCW 11.48.020 grants to a personal representative the right to possession and management of the property of the probate estate:

Every personal representative shall, after having qualified, by giving bond as hereinbefore provided, have a right to the immediate possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs or devisees, and shall keep in tenantable repair all houses, buildings and fixtures thereon, which are under his or her control.

According to these provisions, Mr. Westall clearly has authority to possess, administer, and, if needed and authorized by statute, sell the Trust's interest in the Commercial Real Property. That authority, however, is limited by Washington law. Long before Mr. Westall sought approval for his purchase, title to Sandra Westall's one-half undivided community property interest in the Commercial Real Property had vested in Trustee Bill Peacher under the provisions of RCW 11.04.250,¹ which provides, in pertinent part:

When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, ***his or her title shall vest immediately in his or her heirs or devisees, subject to his or her debts, family allowance, expenses of administration, and any other charges for which such real estate is liable under existing laws.*** No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in

¹ See also RCW 11.04.290, which extends the provisions of RCW 11.04.250 to community property.

any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent: PROVIDED, That no person shall be deemed a devisee until the will has been probated.

(Emphasis added.)

Pursuant to this provision, title to Sandra Westall's interest in the Commercial Real Property vested in Trustee Bill Peacher on May 15, 2015, when her Will was admitted to probate. While Mr. Westall retains the right of possession and management of the Commercial Real Property, neither he, the "community," nor the estate holds title to it. Mr. Peacher cannot be divested of that title unless a sale of the Commercial Real Property would be required to pay the liabilities of the estate, the family allowance (not an issue in this case), the expenses of administration, and any other charges for which such real estate is liable under existing laws (*e.g.*, claims against the estate under RCW 11.40 or funeral expenses, expenses of last sickness, taxes, etc. under RCW 11.76.110). Mr. Westall cannot compel a sale of the Trust's interest in the Commercial Real Property simply because he wants to own the entire Property himself.

Given the existing assets in the estate, there was no need for a sale of the Trust's interest in the Commercial Real Property, let alone a sale to Mr. Westall. While Mr. Westall claims at page 14 of his brief that "the community debts have not been satisfied in full," that statement is, at best,

misleading. The most recent draft of the Amended Schedule of Probate Assets (provided by the attorney representing Mr. Westall in his capacity as Personal Representative of the Community Property) shows no liabilities, and the assets shown (including the Commercial Real Property valued per a February 10, 2016, Comparative Market Analysis at \$385,000) are valued at well over \$700,000. CP 251-253. At this point of the probate, there are no unpaid creditors' claims and the only costs that exist are costs of administration (Personal Representative's fees, if any, and legal fees), which no one claims will deplete the assets of currently held in the estate. At the time Mr. Westall proposed to purchase the Trust's interest in the Commercial Real Property, he identified no charges for which that Property may be liable. Accordingly, there was no statutory basis for Mr. Westall to compel a sale to himself of the Trust's interest in the Commercial Real Property, and the trial court properly denied Mr. Westall's motion.

2. Paul Westall had a Conflict of Interest and Without Court Approval, His Proposed Purchase of the Trust's Interest in the Commercial Real Property Would Have Been Voidable by the Trustee or the LGAL.

As set forth above, Washington law grants a personal representative broad authority to administer an estate, including selling estate assets, without the intervention of the court. That authority is not without limits, however. As noted above, a personal representative with

nonintervention powers is “subject to the same limitations of liability, that a trustee has under chapters 11.98, 11.100, and 11.102 RCW with regard to the assets of the estate, both real and personal.” RCW 11.68.090(1).

Thus, when Paul Westall sought to purchase the Trust’s interest in the Commercial Real Property, he was subject to the same limitations of liability imposed upon a trustee under RCW Chapter 11.98, including complying with the duty of loyalty. RCW 11.98.078. To meet that duty, Paul Westall must administer the probate solely in the interests of the beneficiaries, which include himself and the Trust established by Sandra Westall for their daughter, Destiny. RCW 11.98.078(1). Because the Westall estate has two beneficiaries, Mr. Westall is also required by RCW 11.98.078(8) to act impartially in administering the probate estate and distributing estate property, giving due regard to the beneficiaries’ respective interests. Further, because Mr. Westall was seeking to engage in a transaction involving estate property – a transaction affected by a conflict between his fiduciary and personal interests – he was required to comply with RCW 11.98.078(2) if he wanted to ensure that the transaction would not be voidable.²

² RCW 11.98.078(2) provides:
Subject to the rights of persons dealing with or assisting the trustee as provided in RCW 11.98.105, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's

It is unclear whether Mr. Westall was aware of this statutory provision, but when he proposed his purchase of the Trust's interest in the Commercial Real Property, both the LGAL and Mr. Peacher objected. At page 11 of Mr. Westall's Appellate Brief, however, he states that he "does not need court approval to sell the community property assets." Given that the LGAL and the Trustee of the Trust had both objected to the proposed transaction, and that none of the other exceptions under RCW 11.98.078(2) applied, the transaction proposed by Mr. Westall would have been voidable by an estate beneficiary "without further proof" unless he obtained court approval of that transaction. *See* RCW 11.98.078(4).³

3. The Trustee Never Accepted Any of Mr. Westall's Proposals to Purchase the Commercial Real Property from the Trust.

Paul Westall made several offers to Trustee Bill Peacher to purchase the Trust's interest in the Commercial Real Property, but Mr.

fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

- (a) The transaction was authorized by the terms of the trust;
- (b) The transaction was approved by the court or approved in a nonjudicial binding agreement in compliance with RCW 11.96A.210 through 11.96A.250;
- (c) The beneficiary did not commence a judicial proceeding within the time allowed by RCW 11.96A.070;
- (d) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with RCW 11.98.108; or
- (e) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

³ RCW 11.98.078(4) provides: "A sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account that is voidable under subsection (2) of this section may be voided by a beneficiary without further proof."

Peacher accepted none of those offers. A sale of the Property could have taken place – and may yet take place – upon terms acceptable to the Trustee. Because he is the Trustee, however, Mr. Peacher has a fiduciary duty to his niece, Destiny Westall, and is obligated to get fair value for the sale of any Trust assets.

Mr. Peacher did not accept any of the offers made by Mr. Westall for the purchase of the Trust's interest in the Commercial Real Property because Mr. Peacher believed that the Property was worth more than what Mr. Westall had offered. This is not unreasonable, given that Mr. Westall himself had listed the Commercial Real Property for sale at \$1.995 million in 2014. Mr. Peacher was seeking to fulfill his fiduciary duty when he asked the court to allow the Property to be listed to see what it might bring on the open market, and the court properly granted that request.

Mr. Peacher was also concerned about the terms of any purchase offer presented by Mr. Westall, including Mr. Westall's ability to obtain financing for any such purchase. As of the date of the hearing on Mr. Westall's motion, Mr. Peacher had not found the terms of any of Mr. Westall's offers compelling enough to accept. Without a meeting of the minds on the terms of a purchase and sale, that transaction simply cannot take place.

C. Upon Regaining Jurisdiction of the Probate Action at the Request of Mr. Westall, the Trial Court had Plenary Power under TEDRA and Properly Entered an Order that the Commercial Real Property be Listed for Sale by an Independent Third Party.

Paul Westall brought a motion before the trial court, asking it to approve his proposed purchase of the Trust's interest in the Commercial Real Property. By doing so, he invoked the jurisdiction of the Superior Court, and should not now be permitted to object to the court's exercise of jurisdiction. Upon regaining jurisdiction, the court had broad authority under TEDRA and Title 11 RCW to proceed with the administration and settlement of the estate in any manner and way that to the court seemed right and proper, all to the end that the matter before it be expeditiously administered and settled by the court. RCW 11.96A.020. Thus, the court properly exercised its authority under TEDRA when it ordered that an independent third party should be engaged to list the Commercial Real Property for sale with a broker and to bring to the attention of the parties any purchase offers received in response to that listing.

1. Although Paul Westall was Granted Nonintervention Powers, He Invoked the Jurisdiction of the Court When He Filed his Motion Seeking to Compel the Sale of the Trust's Interest in the Commercial Real Property.

Despite the fact that he was granted nonintervention powers, Mr. Westall invoked the jurisdiction of the Superior Court and invited that Court's intervention when he brought his motion seeking approval of his

proposed purchase of the Trust's interest in the Commercial Real Property. While Mr. Westall argues at page 12 in his brief that the Superior Court did not have jurisdiction to intervene because he had nonintervention powers, the fact that he brought a motion asking the court to intervene bars any argument that the court did not have authority to deny his motion and impose another remedy once it regained jurisdiction over the case in response to Mr. Westall's motion.

In Washington, a personal representative may administer the estate of a decedent without intervention by the court when certain conditions are met. *In re Estate of Hookom*, 52 Wn. App. 800, 803, 764 P.2d 1001, 1003 (1988); *see also* RCW 11.68.

This is not a limitation, but rather a grant of power to the executor. *If in his judgment matters arise in the settlement of the estate requiring judicial determination, he may invoke the jurisdiction of the superior court*, either in equity or in probate. But this must be of his own volition.

In re Estate of Hookom, 52 Wn. App. At 803 (italics in original). A superior court's jurisdiction over nonintervention probate proceedings is limited and depends on the "legislative scheme." *In re Estate of Harder*, 185 Wn. App. 378, 382, 341 P.3d 342, 344 (2015) (quoting *In re Estate of Bobbitt*, 60 Wn. App. 630, 632, 806 P.2d 254 (1991)). Thus, after the superior court declares that a nonintervention estate is solvent, the superior court loses jurisdiction *unless the executor or another person with*

statutorily conferred authority properly invokes it again. Id., (citing *In re Estate of Jones*, 152 Wn.2d 1, 9, 93 P.3d 147 (2004)) (emphasis added).

Here, Mr. Westall, the Personal Representative of the Community Property, invoked the jurisdiction of the superior court under TEDRA when he filed his motion asking the court to approve the sale to himself of the Trust's interest in the Commercial Real Property. In the hearing on that motion, the court exercised jurisdiction under the authority granted by TEDRA when it denied Mr. Westall's motion and instead ordered that an independent third party be authorized to list the Commercial Real Property for sale. Mr. Westall should not be allowed to object to the jurisdiction of the trial court where he was the very party who invoked that jurisdiction.

2. The Trial Court Properly Exercised its Discretion When It Appointed a Disinterested Party to Enter into a Listing Agreement and Bring Any Offers to Purchase the Commercial Real Property to the Attention of the Parties.

TEDRA affords courts broad authority and discretion over probate and estate proceedings. TEDRA provides that, "the courts shall have full and ample power and authority ... to administer and settle: (a) All matters concerning the states and assets of ... deceased persons." RCW 11.96A.020(1). Further, if TEDRA,

should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the

administration and settlement of the matters listed in subsection (1) ... , the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.

RCW 11.96A.020(2). The relevant “matters” referred to in this case include:

any issue, question, or dispute involving:

(b) The direction of a personal representative ... to do or abstain from doing any act in a fiduciary capacity;

(c) The determination of any question arising in the administration of an estate or trust, ... or with respect to any other asset or property interest passing at death....

RCW 11.96A.030(2).

The disposition of the Commercial Real Property in the present case fits the definition of a “matter” under TEDRA. RCW 11.96A.030(2). Accordingly, the superior court had “full and ample power and authority ... to administer and settle” the present dispute by directing that an independent third party – an attorney with substantial experience in such matters – be appointed to list the Commercial Real Property for sale and to bring any purchase offers to the attention of the parties.

D. The Trial Court is Authorized to Order a Partition of the Commercial Real Property as Between Mr. Westall and the Trustee, and to the Extent Such Property Cannot be Fairly Divided, the Court May Order that the Property be Sold and the Proceeds Divided Between the Parties.

Mr. Westall states in his Brief that the “Estate has not been closed, the community debts have not been satisfied in full, and the Estate’s assets have not been distributed to the beneficiaries, including to the Trust.” Appellant’s Opening Brief, p. 14. This statement is not entirely accurate, and Mr. Westall has not identified any community debts that have *not* been satisfied. Even if there were, the Estate has ample liquid assets that could be used to satisfy such debts, and the responsibility for paying those debts resides with Mr. Westall. The Estate has remained open for two and a half years because Mr. Westall has continued to pursue the purchase of the Trust’s half of the Commercial Real Property. The trial court recognized this and entered the Order at issue in this appeal in an effort to resolve that issue.

It should be noted that the July 28th Order at issue does not require the sale of Mr. Westall’s undivided one-half interest in the Commercial Real Property – it only requires that the Property be listed for sale. The Order does not implicate any property interest belonging to Mr. Westall because it does not require that he sell his interest in the Commercial Real Property. Instead, the court’s Order is an attempt to establish an actual fair market value for the

Commercial Real Property by a means other than an opinion, whether a CMA or an MAI appraisal.

Accordingly, Mr. Westall's argument in his Opening Brief that the trial court lacks jurisdiction over Paul Westall's half of the Commercial Real Property is not at issue and need not be addressed by this Court. Nonetheless, the trial court does have jurisdiction over Mr. Westall's half of the Commercial Real Property pursuant to RCW 11.02.070, which provides that "[t]he whole of the community property shall be subject to probate administration for all purposes of this title."

Where, as here, all the liabilities of the estate have been paid, the disposition of the Commercial Real Property and the remaining Estate assets must be resolved to close the probate. Both Mr. Westall and Trustee Bill Peacher hold legal title to an undivided one-half interest in the Commercial Real Property – they are tenants in common in that Property. Should the probate be closed with that result, Mr. Peacher would then be able to petition the court for partition under Chapter 7.52 RCW, and would be entitled to the remedies provided therein, which, given the nature of the Property, would likely be an order directing the sale of the Property.

Instead of requiring Mr. Peacher to pursue a separate action, however, RCW 11.76.050 provides the court in this probate action with another option, authorizing it to order partition or sale of any property held in the estate:

The court may, upon such final hearing, partition among the persons entitled thereto, the estate held in common and undivided, and designate and distribute their respective shares; or assign the whole or any part of said estate to one or more of the persons entitled to share therein. The person or persons to whom said estate is assigned shall pay or secure to the other parties interested in said estate their just proportion of the value thereof as determined by the court from the appraisement, or from any other evidence which the court may require.

If it shall appear to the court at or prior to any final hearing that the estate cannot be fairly divided, then the whole or any part of said estate may be sold or mortgaged in the manner provided by law for the sale or mortgaging of property by personal representatives and the proceeds thereof distributed to the persons entitled thereto as provided in the final decree.

The court shall have the authority to make partition, distribution and settlement of all estates in any manner which to the court seems right and proper, to the end that such estates may be administered and distributed to the persons entitled thereto. No estate shall be partitioned, nor sale thereof made where partition is impracticable except upon a hearing before the court and the court shall fix the values of the several pieces or parcels to be partitioned at the time of making such order of partition or sale; and may order the property sold and the proceeds distributed, or may order partition and distribute the several pieces or parcels, subject to such charges or burdens as shall be proper and equitable.

The provisions of this section shall be concurrent with and not in derogation of other statutes as to partition of property or sale.

RCW 11.76.050 (emphasis added).

Mr. Peacher has not yet asked the court to impose this remedy. While he has always been open to the prospect of a sale of the Trust's one-half interest in the Commercial Real Property to Mr. Westall, Mr. Peacher is

mindful that he has a fiduciary duty to act with the best interests of Destiny Westall in mind, and such duty requires that he seek fair value for any sale of the Trust's interest in the Commercial Real Property. In his opinion, he has not yet received an offer from Mr. Westall that reflects the value that Mr. Peacher believes is necessary to justify that sale. The trial court's Order directing that the Commercial Real Property be listed to test the market and provide a true market value for the Commercial Real Property was the next logical step in that process, and should be affirmed by this Court.

E. This Court Should Enter an Award from Mr. Westall to the Trust of the Attorneys' and Litigation Guardian ad Litem Fees and Costs It Has Incurred in Responding to this Appeal.

Trustee Bill Peacher requests that this Court enter an award from Mr. Westall to the Trust of the costs, including reasonable attorneys' fees and Litigation Guardian ad Litem fees that the Trust has incurred in responding to this appeal. A party may recover attorney fees and costs on appeal when granted by applicable law. RAP 18.1(a). TEDRA permits an award of attorney fees on appeal, providing in pertinent part:

Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; . . . The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and

appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RCW 11.96A.150(1).

Mr. Westall is seeking appeal of a self-dealing motion he brought in breach of his fiduciary duty under RCW 11.98.078(8) to act impartially in administering the probate estate and distributing estate property, giving due regard to the beneficiaries' respective interests. Mr. Westall has no legal basis to support his assertion that he is entitled to compel a sale to himself of the Trust's interest in the Commercial Real Property without the consent of the Trustee, or that the trial court erred when it denied his motion seeking approval of such a sale. Mr. Westall brought this appeal entirely for his own benefit, and it provides no benefit to the probate estate or to the Trust that is to be funded with assets from the probate estate. This appeal has further contributed to delay and expense created by Mr. Westall's failure to perform his responsibilities as Personal Representative. Accordingly, Trustee Bill Peacher requests that this Court enter an award to the Trust from Mr. Westall of the costs, including reasonable attorneys' fees and fees of the LGAL, that the Trust has incurred in responding to this appeal.

VI. CONCLUSION

In his motion, Mr. Westall lamented that this probate action has been ongoing for over two years now, and he blamed the LGAL and Mr. Peacher for the delay in settling the estate, suggesting they “put away the slings and arrows against Paul.” CP 388, 389. Yet, this estate has not yet been settled because Mr. Westall has been obsessed with obtaining full ownership of the Commercial Real Property at issue and has doggedly pursued that goal. The LGAL and Mr. Peacher, both fiduciaries, have a duty to Destiny Westall to see that the assets of the Trust are productive and if they are sold, that the Trust will receive fair value for its interest in that property.

Mr. Westall himself is under a similar fiduciary duty, yet in violation of that duty, he sought to compel a sale of the Trust’s interest in the Commercial Real Property to himself at a price that the LGAL and the Trustee believe is below what the market will bear. Mr. Westall cannot compel a sale of the Commercial Real Property without the consent of the Trustee where there is no statutory basis for such a sale, *e.g.*, paying creditors’ claims or the costs of administration. The trial court was correct when it denied his motion and refused to approve the sale.

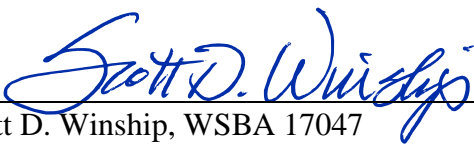
The trial court was also correct when it ordered an independent third party be appointed to enter into a listing agreement to allow the Commercial Real Property to be listed. While the court could have ordered a partition

under the provisions of RCW 11.76.050, it instead imposed an incremental remedy that would allow the parties to test the market and be confident of the value of the Commercial Real Property. With that knowledge, the parties could either negotiate a sale of the Trust's interests to Mr. Westall, or decide to accept an offer that would benefit them both equally.

By relentlessly pursuing his desire to acquire the Trust's half of the Commercial Real Property, Mr. Westall has failed to acknowledge that he has no legal justification for compelling the Trust to sell its interest, and he has failed to see that, as a fiduciary himself, he has breached his duty to act impartially and to give due regard to the beneficiaries' respective interests. Because he has no justification for either his motion before the trial court or this appeal, this Court should require Mr. Westall to pay the costs, including reasonable attorneys' fees and the fees for the Litigation Guardian ad Litem, that the Trust has incurred in responding to this appeal.

Respectfully submitted,

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By 

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